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13 **IN THE UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 A.D. and C. by CAROL COGHLAN
16 CARTER, their next friend;
17 S.H. and J.H., a married couple;
18 M.C. and K.C., a married couple;
19 for themselves and on behalf of a class of
20 similarly-situated individuals,

21 Plaintiffs,

22 v.

23 KEVIN WASHBURN, in his official
24 capacity as Assistant Secretary of BUREAU
25 OF INDIAN AFFAIRS; SALLY JEWELL,
26 in her official capacity as Secretary of
27 Interior, U.S. DEPARTMENT OF THE
28 INTERIOR;
GREGORY A. McKAY, in his official
capacity as Director of the ARIZONA
DEPARTMART OF CHILD SAFETY,

Defendants.

No. 2:15-CV-01259- PHX-NVW

**FEDERAL DEFENDANTS’
NOTICE OF SUPPLEMENTAL
AUTHORITIES**

(Assigned to The Honorable Neil V.
Wake)

1 Federal Defendants respectfully submit this Notice of Supplemental Authorities
2 to bring to the Court's attention the December 9, 2015 decision of the U.S. District
3 Court for the Eastern District of Virginia in *National Council for Adoption et al. v.*
4 *Jewell et al.*, No. 15-cv-00675 (E.D. Va., December 9, 2015) (attached as Exhibit 1). In
5 a detailed opinion, the court rejected plaintiffs' suite of claims, many of which
6 substantially overlap with the claims in this case, and granted Federal Defendants'
7 motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim.
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10 The court rejected an APA challenge to the Guidelines, concluding they are not
11 justiciable as they are not final agency action under the APA. *Id.* at 10. The court also
12 rejected plaintiffs' constitutional claims for failure to demonstrate authority to support
13 such challenges. *Id.* The court reasoned that the "equal protection claims fail because
14 the 2015 Guidelines are not race-based, but instead, based on one's political
15 membership in a federal recognized Indian tribe, which does not cease when that
16 member leaves of [sic] the reservation." *Id.* at 11. Next, in rejecting plaintiff's argument
17 that ICWA exceeds Congress' authority under the Indian Commerce Clause, the court
18 recognized the difference between the Indian Commerce Clause and Interstate
19 Commerce Clause, *id.* at 13, and stated that Congress' legislative authority over Indian
20 affairs stems from more than the Indian Commerce Clause; it also derives from pre-
21 constitutional powers and the trust relationship between the federal government and
22 Indian tribes. *Id.* (citations omitted). Finally, the court found unpersuasive plaintiffs'
23 argument that the Guidelines impermissibly commandeer state courts and agencies
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1 because they do not mandate state court compliance. *Id.* at 14 (citation omitted).

2 For the Court's convenience, the opinion in *National Council for Adoption* is
3 attached hereto as Exhibit 1.
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5 Federal Defendants would also like to respond to Plaintiffs' Notice of
6 Supplemental Authority with respect to: Opinion of the Arizona Court of Appeals,
7 Division One, in *Gila River Indian Community v. Department of Child Safety*, No. 1
8 CAJV 15-0178 (December 8, 2015); ECF No. 109, Ex. 1. Contrary to Plaintiffs'
9 representations, the Arizona Court of Appeals' decision in no way "highlights the
10 separate, unequal, and substandard treatment given under [ICWA] to Indian children."
11 ECF No. 109 at 2. The court expressed concern that deviating from ICWA's placement
12 preferences "remove[s], or at the very least, distance[s] an Indian child from his or her
13 native community" and is "likely to occur more readily under a preponderance of
14 evidence standard." No. 1 CAJV 15-0178 at 7. The court noted that the Guidelines,
15 "although non-binding," recommended a clear and convincing standard. *Id.* However,
16 the court decided to adopt the clear and convincing standard not by looking at the
17 recommendation in the Guidelines alone, but also by looking at ICWA and its
18 legislative history, Supreme Court precedent, and "the clear majority view of other state
19 courts." *Id.* 6-8. This decision does not demonstrate harm or substandard treatment
20 towards Indian children, but instead demonstrates a state court's decision to settle a
21 question of first impression under Arizona law through the lens of ICWA; Congress'
22 stated purpose in enacting ICWA; and the statutory protections afforded by ICWA to
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1 Indian children and Indian communities.

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3 RESPECTFULLY SUBMITTED this 10th day of December, 2015.

4 JOHN C. CRUDEN
5 Assistant Attorney General

6 s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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